Supreme Court, U.S.
FILED
AUG
OFFICE OF THE CLERK

No. 93-054

In The

Supreme Court of the United States

October Term, 1993

GLORIA KELLEY,

Petitioner,

vs.

KIRKPATRICK & LOCKHART, a Professional Association consisting of partners engaged in the practice of law, BRIAN FOREMNY, individually and as agent of Kirkpatrick & Lockhart, REGINA MARCH, Office Administrator, individually and as agent of Kirkpatrick & Lockhart, jointly and severally,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JEFFREY A. TEW, ESQUIRE

KIRKPATRICK & LOCKHART
201 South Biscayne Blvd.
Miami Center – Suite 2000
Miami, Florida 33131
Florida Bar No. 121291
Telephone: (305) 539-3300

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the Eleventh Circuit Court of Appeals erred in affirming the District Court's dismissal of Petitioner's Amended Complaint.

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The undersigned certifies that the following persons or entities have an interest in the outcome of this case:

1. Bandstra, Ted E. – United States Magistrate Judge
   United States District Court
   Southern District of Florida
   301 North Miami Avenue
   Miami, Florida 33128

2. Foremny, Brian – Respondent
   Kirkpatrick & Lockhart
   201 South Biscayne Blvd., Suite 2000
   Miami, Florida 33131

3. Kelley, Gloria – Petitioner
   10564 S. W. 112 Avenue
   Miami, Florida 33176

4. Kirkpatrick & Lockhart – Respondent
   201 South Biscayne Blvd., Suite 2000
   Miami, Florida 33131

5. March, Regina – Respondent
   Kirkpatrick & Lockhart
   201 South Biscayne Blvd., Suite 2000
   Miami, Florida 33131

6. Nesbitt, Lenore C. – United States District Court Judge
   United States District Court
   Southern District of Florida
   301 North Miami Avenue
   Miami, Florida 33128

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT – Continued

7. Jeffrey Allen Tew – Attorney for Respondents
   Kirkpatrick & Lockhart
   201 South Biscayne Blvd., Suite 2000
   Miami, Florida 33131

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT ii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vi

I. RESPONDENTS' BRIEF IN OPPOSITION TO CERTIORARI 1

II. STATEMENT OF THE CASE 1

A. COURSE OF PROCEEDINGS AND DISPOSITIONS IN COURTS BELOW 1

B. STATEMENT OF THE FACTS 3

C. STANDARD OF REVIEW 3

III. SUMMARY OF ARGUMENT 4

IV. ARGUMENT 6

A. INTRODUCTION 6

B. ADA CLAIM 6

C. FREEDOM OF SPEECH CLAIM 8

D. PENDENT STATE LAW CLAIMS 9

1. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS 10

2. BREACH OF IMPLIED CONTRACT .. 10

TABLE OF CONTENTS – Continued

Page

3. DAMAGE TO REPUTATION, RATIFICATION OF DISCRIMINATORY FIRING, TORT OF RETALIATORY DISCHARGE AND BREACH OF DUTY 11

E. DISMISSAL OF PETITIONER'S COMPLAINT FOLLOWED WELL-ESTABLISHED PRECEDENT 11

V. CONCLUSION 12

TABLE OF AUTHORITIES

Page

CASES

Braxton v. United States, 111 S.Ct. 1854 (1991) 4

Hudgens v. NLRB, 424 U.S. 507, 96 S.Ct. 1029 (1976) 8

McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973) 7

Metropolitan Life Insurance Co. v. McCarson, 467 So. 2d 277 (Fla. 1985) 10

Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 94 S.Ct. 2831 (1974) 8

Moore v. Sunbank of North Florida, N. A., 923 F.2d 1423 (11th Cir. 1991) 6

Morast v. Lance, 807 F.2d 926 (11th Cir. 1987) 9

NAACP v. Hunt, 891 F.2d 1555 (11th Cir. 1990) 8

Newman-Green, Inc. v. Alfonso-Larrain, 109 S.Ct. 2218 (1989) 9

Puckett v. Tennessee Eastman Co., 889 F.2d 1481 (6th Cir. 1989) 7

R. C. Maxwell Co. v. Borough of New Hope, 735 F.2d 85 (3rd Cir. 1984) 8

Sheet Metal Workers Int'l. Ass'n v. Lynn, 109 S.Ct. 639 (1989) 8

Wooley v. Maynard, 430 U.S. 705, 97 S.Ct. 1428 (1977) 8

TABLE OF AUTHORITIES – Continued

Page

STATUTES

28 U.S.C. § 1332 9

42 U.S.C. § 2000e-5 7

42 U.S.C. § 2000e-5(e) and (f) 7

42 U.S.C. § 12101 6

42 U.S.C. § 12111 6

42 U.S.C. § 12117 7

104 Stat. 337 6

Pub.L. 101-336, Title I, § 108 6

Sup. Ct. R. 10 3

I. RESPONDENTS' BRIEF IN OPPOSITION TO CERTIORARI

Respondants, Kirkpatrick and Lockhart, Brian Foremny, and Regina March, request that this Court deny the petition for writ of certiorari seeking review of the opinion of the United States Court of Appeals for the Eleventh Circuit (the "Eleventh Circuit") entered on March 30, 1993.

II. STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS AND DISPOSITIONS IN COURTS BELOW

On October 10, 1991, Petitioner Gloria Kelley, proceeding *pro se*, commenced her employment discrimination action seeking damages against her former employer, Kirkpatrick & Lockhart ("K&L"), Brian Foremny ("Foremny"), a partner of K&L, and Regina March ("March"), the office administrator of K&L for, *inter alia*, alleged statutory and constitutional violations arising out of Petitioner's discharge from employment with K&L as a legal secretary.[1] A.5. Specifically Petitioner's original complaint asserted claims for discrimination under the Americans with Disabilities Act of 1990 ("ADA") (Count I), violation of constitutional right of freedom of speech (Count II), intentional infliction of emotional distress

---

[1] References to the opinions below, as reprinted in the Appendix to Petitioner's brief, will be in the form A. References to the Record below will be in the form R.

(Count III), breach of implied contract (Count IV), damage to reputation (Count V) and ratification of discriminatory firing (Count VI). A. 6.

On December 11, 1991, Petitioner filed a pleading captioned "Amendment to Plaintiff's Complaint" in which she purported to add the Florida state law tort claims of retaliatory discharge (Count VII) and breach of duty (Count VIII) to her original Complaint.

On December 17, 1991, Respondents filed their Motion to Dismiss Amended Complaint and Memorandum of Law in Support Thereof for failure to state a claim upon which relief may be granted under federal or state law. On January 27, 1992, Respondents supplemented their Motion with the filing of an additional Memorandum of Law in support thereof. A. 6.

On January 31, 1992, United States Magistrate Judge Ted E. Bandstra, pursuant to an Order of Reference dated October 31, 1991, made his Report and Recommendation to the District Court recommending that the Amended Complaint be dismissed. A. 4-12.

On June 8, 1992, United States District Court Judge Lenore C. Nesbitt affirmed Magistrate Judge Bandstra's Report and Recommendation and entered an Order of Dismissal granting Respondents' Motion to Dismiss the Amended Complaint *in toto*. A. 13-14. After Petitioner filed a timely notice of appeal of the dismissal, the Eleventh Circuit affirmed the dismissal in a per curiam opinion. A. 15-17. Petitioner then filed a Motion for Rehearing which was denied on May 13, 1993. A. 18-19.

B. STATEMENT OF THE FACTS

From February 16, 1987 through April 12, 1991, Petitioner was employed by Respondent K&L as a legal secretary. During this period of time, Petitioner worked for two attorneys as did every legal secretary in K&L's Miami office. R1-21.

As a result of her inability to handle the workload generated by the two attorneys for whom she worked (one of whom was Respondent Foremny), Petitioner requested a reassignment in December, 1989. R1-21. In order to accommodate this request, the other attorney for whom Petitioner worked was assigned to another secretary. After January, 1990, Petitioner remained as legal secretary to Respondent Foremny and also served as administrative secretary to Respondent March, K&L's office manager in Miami. R1-21.

Notwithstanding the reduction in her workload, Petitioner's performance continued to deteriorate until her employment with K&L was terminated on or about March 26, 1991, effective April 12, 1991. R1-21.

Petitioner has alleged that her termination was the result of an unspecified heart condition. If, in fact, Petitioner has a heart condition, this fact was unknown to Respondents and played no part in her discharge. R1-21.

C. STANDARD OF REVIEW

A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. Sup. Ct. R. 10. The principal

purpose for which the United States Supreme Court uses certiorari jurisdiction is to resolve conflicts among Circuit Courts of Appeals and state courts concerning the meaning of provisions of federal law. *Braxton v. United States*, 111 S.Ct. 1854 (1991).

III. SUMMARY OF ARGUMENT

Petitioner has not demonstrated that the dismissal of her Amended Complaint resulted in a conflict among the Circuit Courts of Appeals or state courts concerning the meaning of provisions of federal law. Nor has she shown any special or important reasons for the granting of her petition. On the contrary, the lower courts correctly followed established precedent in dismissing Petitioner's Amended Complaint.

The Amended Complaint filed by Petitioner contained claims for discrimination under the Americans with Disabilities Act of 1990 ("ADA") (Count I), for violation of the constitutional right of freedom of speech (Count II), and numerous Florida state common law claims (Count III through VIII). The parties are non-diverse. Consequently, only Counts I and II can possibly provide a basis for federal jurisdiction.

Petitioner has not, and cannot, state a claim upon which relief could be granted in Count I of the Amended Complaint under the ADA. The event of which Petitioner complains, the termination of her employment with K&L, occurred in excess of 15 months prior to the effective date of the ADA. Therefore, the dismissal of Count I of the Amended Complaint, as recommended by the Magistrate

Judge, ordered by the District Court, and affirmed by the Eleventh Circuit, was correct.

Petitioner has not, and cannot, state a claim upon which relief could be granted in Count II of the Amended Complaint under the First Amendment to the United States Constitution. Even if sufficient facts were alleged to show a restriction of Petitioner's speech by Respondents, a private law firm, one of its partners and its office administrator, Petitioner cannot allege any kind of "state action" necessary to sustain a freedom of speech violation. Consequently, the dismissal of Count II of the Amended Complaint, as recommended by the Magistrate Judge, ordered by the District Court, and affirmed by the Eleventh Circuit, was correct.

Finally, Petitioner's pendant state law claims in Counts III through VIII are non-diverse and offer no basis for federal jurisdiction. Even if diversity of citizenship between the parties did exist, Petitioner has not, and cannot, state a claim upon which relief could be granted under Florida law. Because no federal claim exists, the dismissal of Petitioner's pendent state law claims in Counts III through VIII of the Amended Complaint, as recommended by the Magistrate Judge, ordered by the District Court, and affirmed by the Eleventh Circuit, was correct.

IV. ARGUMENT

A. INTRODUCTION

Petitioner alleges in her brief that the District Court's dismissal of her Amended Complaint for failure to state a cause of action conflicts with several decisions of this Court as well as decisions of the various Circuit Court of Appeals. In fact, a review of the actions of the courts below clearly shows that the dismissal of Petitioner's Amended Complaint was solidly based on established precedent.

B. ADA CLAIM

In her Amended Complaint, Petitioner attempted to state various federal and state law claims against Respondents arising out of the termination of her employment on or about March 26, 1991. In Count I of the Amended Complaint, Petitioner alleged that she was fired from her job as a legal secretary due to the fact that she suffered from an unspecified heart ailment. Termination of her employment on such grounds, Petitioner alleged, is a violation of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §12101 et. seq..

As found by the Magistrate Judge below, however, the ADA does not apply to Petitioner's claim because the effective date of the ADA is July 26, 1992. Pub.L. 101-336, Title I, § 108, July 26, 1990, 104 Stat. 337 (providing that the coverage section of the ADA, 42 U.S.C. §12111, is effective 24 months after July 26, 1990). *See also, Moore v. Sunbank of North Florida, N. A.*, 923 F.2d 1423 (11th Cir. 1991) (explaining that the ADA becomes effective two

years after the date of its enactment, July 26, 1990). Consequently, Petitioner cannot state a claim under the ADA arising from an allegedly discriminatory firing which occurred on or about March 26, 1991. The dismissal of Count I of the Amended Complaint, as recommend by the Magistrate Judge, ordered by the District Court, and affirmed by the Eleventh Circuit, was correct on this basis alone.

Even if the ADA did apply to Petitioner's claim, however, it is clear that the dismissal of Count I of the Amended Complaint was proper because Petitioner has failed to exhaust her administrative remedies.

Specifically, 42 U.S.C. §12117, the enforcement provision of the ADA, incorporates and adopts the procedures set forth in 42 U.S.C. §2000e-5 for claims of employment discrimination under the ADA. It is well settled under 42 U.S.C. §2000e-5 that the timely filing of charges of employment discrimination with the Equal Employment Opportunity Commission ("EEOC") *and* receipt of a notice of right to sue are conditions precedent to the bringing of an action in federal court. 42 U.S.C. §2000e-5(e) and (f); *Puckett v. Tennessee Eastman Co.*, 889 F.2d 1481, 1486 (6th Cir. 1989) *citing McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 798 (1973).

Petitioner has not alleged, and cannot allege, compliance with these statutory prerequisites. Consequently, even if the ADA was effective at the time of Petitioner's termination, dismissal of Count I of the Amended Complaint was mandated by her failure to exhaust her administrative remedies.

C. FREEDOM OF SPEECH CLAIM

It is impossible to determine from the allegations of the Amended Complaint what it is that Respondents are supposed to have done to stifle or restrict Petitioner's First Amendment right to free speech. Even if sufficient facts were alleged to show such a restriction by Respondents of Petitioner's speech, Petitioner could not state a First Amendment claim against Respondents, a private law firm and one of its partners and its office administrator. "The First Amendment prohibits *governments* from abridging free speech." *NAACP v. Hunt*, 891 F.2d 1555, 1565 (11th Cir. 1990) (emphasis supplied) (citations omitted). Consequently, First Amendment considerations are not ordinarily implicated where private actors restrict speech. *R. C. Maxwell Co. v. Borough of New Hope*, 735 F.2d 85, 87 (3rd Cir. 1984). In fact, the First Amendment has been held to guarantee private actors the right to make such restrictions. *Id.* at p. 87, *citing Hudgens v. NLRB*, 424 U.S. 507, 96 S.Ct. 1029 (1976), *Wooley v. Maynard*, 430 U.S. 705, 97 S.Ct. 1428 (1977) and *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 94 S.Ct. 2831 (1974). In this case, Petitioner has not alleged, and cannot allege, any kind of "state action" involved in her discharge from Respondent K&L. Therefore, Petitioner cannot state a claim under the First Amendment against any of the Respondents.[2]

---

[2] The case cited by Petitioner, *Sheet Metal Workers Int'l. Ass'n v. Lynn*, 109 S.Ct. 639 (1989), is easily distinguishable. In *Lynn*, the employee's cause of action was based on the "free speech" provision of the Labor-Management Reporting and Disclosure Act of 1959. Petitioner can cite no basis for her claim of a violation of her freedom of speech other than the First Amendment.

Morast v. Lance, 807 F.2d 926, 930-932 (11th Cir. 1987). The dismissal of Count II of the Amended Complaint was proper under the well-established precedent of this Court.

D. PENDENT STATE LAW CLAIMS

As demonstrated above, Petitioner failed to state any federal claim against Respondents. Federal question jurisdiction is therefore not present in this action. Because the parties are all citizens of the state of Florida, Petitioner's alleged state law claims are not based upon diversity jurisdiction and the dismissal of Counts III through VIII of the Amended Complaint was proper on this basis alone.[3] Even if Petitioner somehow could establish that her state law claims did have a basis of federal jurisdiction, Counts III through VIII of the Amended Complaint did not state any cause of action against Respondents under Florida law and were properly dismissed.

---

[3] Petitioner argues that diversity jurisdiction is present because Respondent K&L has offices in other states. The statutory provision granting United States District Courts diversity jurisdiction over cases involving citizens of different states, 28 U.S.C. § 1332, has been held to require a complete diversity of citizenship between parties. *Newman-Green, Inc. v. Alfonso-Larrain*, 109 S.Ct. 2218 (1989) (holding that when a plaintiff sues more that one defendant in a diversity action, the plaintiff must meet the requirements of the diversity statute for each defendant or face dismissal). It is undisputed that Petitioner and Respondents Foremny and March are citizens of Florida.

1. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

In Count III of the Amended Complaint, Petitioner alleged that Respondent March denied Petitioner's request for a transfer and "gave additional work to [Petitioner] every opportunity she had." Amended Complaint ¶45. Even if true, which is denied, this action is not the kind of conduct "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency" necessary to state a claim under Florida law for intentional infliction of emotional distress. *Metropolitan Life Insurance Co. v. McCarson*, 467 So. 2d 277, 279 (Fla. 1985). The dismissal of Count III of the Amended Complaint was therefore proper both on the basis of lack of jurisdiction and under Florida substantive law.

2. BREACH OF IMPLIED CONTRACT

In Count IV of the Amended Complaint, Petitioner alleged that she was damaged as a result of an alleged breach of an "implied contract" between Respondents Regina March, Brian Foremny and Respondent K&L. Amended Complaint ¶¶66-67. Petitioner does not set forth the material terms of this supposed contract or how it is she has any rights under it. Respondents were not able to locate any Florida case allowing recovery in such circumstances, nor has Petitioner provided any support for her cause of action. The dismissal of Count IV of the Amended Complaint was therefore proper both on the basis of lack of jurisdiction and under Florida substantive law.

3. DAMAGE TO REPUTATION, RATIFICATION OF DISCRIMINATORY FIRING, TORT OF RETALIATORY DISCHARGE AND BREACH OF DUTY

In Counts V through VIII of the Amended Complaint, for "Damage of Reputation," "Ratification of Discriminatory Firing," "Tort of Retaliatory Discharge" and "Breach of Duty" appear to be based upon Petitioner's alleged employment discrimination claim in Count I of the Amended Complaint. As such, Counts V through VIII were properly dismissed based on the reasoning discussed above at Section IV(B) of this brief. In any event, Respondents have been unable to discern any Florida state law claim alleged in Counts V, VI and VII. The dismissal of these Counts was therefore proper both on the basis of lack of jurisdiction and under Florida substantive law. To the extent that Count VII could be construed to state a claim under Florida law, its dismissal should be affirmed for lack of subject matter jurisdiction.

E. DISMISSAL OF PETITIONER'S COMPLAINT FOLLOWED WELL-ESTABLISHED PRECEDENT

As discussed above, the dismissal of Petitioner's Amended Complaint followed the well-established precedent of this Court. The rulings and reasoning of the lower courts did not conflict with any opinions of this Court or the various Circuit Courts of Appeals. Furthermore, Petitioner has failed to show any special or important reason for this Court to expend its resources reviewing the dismissal of the Amended Complaint.

V. CONCLUSION

For the reasons set forth herein, it is respectfully submitted that Gloria Kelley's petition for writ of certiorari be denied.

Respectfully submitted,

JEFFREY A. TEW, ESQUIRE

KIRKPATRICK & LOCKHART
201 South Biscayne Blvd.
Miami Center – Suite 2000
Miami, Florida 33131
Telephone: (305) 539-3300

Attorneys for Respondents